PADANG SERAI KILANG KAYU BHD

v.

KHOR KIA FONG & ORS

HIGH COURT MALAYA, ALOR SETAR
ALAUDDIN MOHD SHERIFF J
[CIVIL SUIT NO: 216 OF 1985]
13 NOVEMBER 1997

LAND LAW: *Transfer - Limitation - Whether claim was time-barred - Whether time started to run when right of plaintiff threatened - Whether time started to run at time of sale - Limitation Act 1953, s. 9(1)*

CIVIL PROCEDURE: *Action - Parties - Whether defendants were properly joined as parties - Whether administrators of estate should be joined as defendants*

The plaintiff company had brought an action against the defendants, for specific performance of a verbal agreement to transfer a piece of land ('the said land'), to the plaintiff. The land was registered in the names of the defendants as beneficiaries of the deceased. By a sale and purchase agreement between the deceased and the plaintiff, the plaintiff had agreed to purchase the entire partnership business of the deceased and in consideration of 3000 shares in the plaintiff company, the deceased had agreed orally to transfer the said land on which the factory stood, to the plaintiff. However that oral agreement was not included as one of the terms in the purchase agreement, but the possession of the said land had always been with the plaintiff.

The defendants submitted that the plaintiff's claim was statute-barred and that they were improperly joined as parties. Furthermore, the oral evidence with regard to the undertaking by the deceased to transfer the said land was inadmissible. The issues before the court were: (i) whether the claim of the plaintiff was time-barred; and (ii) whether oral evidence could be admitted to substantiate the plaintiff's claim.

Held:

[1] An action to recover land is governed by s. 9(1) of the Limitation Act 1953. The period of limitation in relation to an action for recovery of land is 12 years and it starts to run from the date of any infringement or threat of infringement of the appellant's right under the agreement. In the case of an action founded on contract, the time runs from the breach.

[1a] The plaintiff's claim was for a declaratory relief that the said land belonged to it and for specific performance of the verbal agreement. Therefore the plaintiff's claim was an action to recover land. The plaintiff had been in possession of the said land, so there was no infringement of the right of the plaintiff before the commencement of the action against the defendants. When the defendants filed their defence to the plaintiff's claim, the defence constituted an unequivocal threat to infringe the right of the plaintiff.

[1b] The defendants had applied to strike out the plaintiff's claim and that action constituted an unequivocal threat to infringe the right of the plaintiff. When the plaintiff became aware that the said land was distributed to the defendants and that the transfer had been registered, there was infringement to the plaintiff's right. Therefore for the purpose of calculating the limitation period, whichever date of the infringement was taken, the plaintiff's action was not time-barred.

[2] The title and interest in the said land had been transferred and registered in the defendants' names as beneficiaries of the deceased's estate. Once the estate had been accordingly distributed to all the beneficiaries, the administrators would have discharged their duties and would no longer be responsible for the estate. Thus for the purpose of the relief sought by the plaintiff, the defendants were the proper parties to be sued.

[3] Under the Evidence Act 1950, ('the Act') ss. 91 & 92 do not preclude the admission of oral evidence completely. In an agreement where there are some terms given orally and some in writing, oral evidence can be given to prove the terms agreed to orally. Where there is a prior oral agreement or statement, verbally agreed to by the parties at the time of executing the document, pertaining to a matter on which the document is silent, evidence relating to its nature, factual background and surrounding circumstances may be given, where the agreement is not inconsistent with or does not contradict the terms of the document.

[3a] In the circumstances the oral evidence adduced by the plaintiff was admissible under provisos (b) and (f) of s. 92 of the Act. The defendants had not denied that the deceased was the only one who owned the land on which the factory stood and since 'land' was mentioned in the agreement, the court was of the opinion that the plaintiff had, by its pleadings and evidence, given a consistent and reasonable explanation as to what had been agreed upon by the parties. There was no evidence to the contrary, so the plaintiff's explanation was accepted.

[3b] The defendants were to execute the transfer of the said land in favour of the plaintiff and should the defendants refuse the Senior Assistant Registrar of the High Court was authorised to effect the said transfer.

[Plantiff's claim allowed with costs.]

Cases referred to:
Hj Othman Abu Bakar v. Saiyed Noor [1952] MLJ 97 ***(refd)***
Ho Ah Kum v. Paya Trubong Estate Sdn Bhd [1987] MLJ 32 ***(refd)***
Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Ptd Ltd [1983] 2 CLJ 187 ***(refd)***
Mt Bolo v. Mt Koklan & Ors [1930] AIR PC 270 ***(refd)***
Nasri v. Mesah [1971] MLJ 32 ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1959] MLJ 86 ***(refd)***
Tan Chong & Sons Motor Company Sdn Bhd v. Alan MC Knight [1982] 1 CLJ 313 ***(refd)***
Wong Sin Meng v. Wong Sum Moi [1991] 2 CLJ 223 ***(cit)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
Limitation Act 1953, ss. 6(1), 9(1)
Rules of the High Court 1980, O. 15 r. 6A

For the plaintiff - Jegadeson; M/s Jega & Assoc
For the defendant - Tan Beng Hong; M/s Tan Beng Hong & Co

Reported by Anne Soh

JUDGMENT

Alauddin Mohd Sheriff J:

The plaintiff company runs a sawmill and timber related business under the name of Padang Serai Kilang Kayu Sdn. Bhd. Its registered address is at Batu 12, Jalan Bagan, Padang Serai, Kedah.

All the defendants are presently registered co-owners of a piece of land comprised in GM 84, Lot No. 11, Mukim of Nagalilit, District of Kulim (the said land).

One Khor Swee Choon (deceased) was originally the registered owner of the said land and before his death was one of the directors of the plaintiff company. The first to the sixth defendants are beneficiaries of Khor Swee Choon's estate whilst the seventh and eighth defendants are the new joint owners of the said land.

By a writ issued on 14 April 1985, the plaintiff seeks a declaration that the said land belongs to them and for an order that the defendants do execute a transfer of the said land to the company and should the defendants refuse to sign all the documents to effect this transfer then the Senior Assistant Registrar of the High Court be authorised to sign all documents on behalf of all the defendants to effect the transfer of the said land.

Briefly, the plaintiff in their statement of claim stated that prior to 1970 ie, before the formation of the plaintiff company, the company was known as Padang Serai Kilang Papan company carrying on business as a partnership dealing with the same business as the plaintiff company. The partners at that material time were (1) Tuan Haji Jais Sudin (2) Tuan Haji Yahaya bin Talib (3) Encik Ahmad bin Taib (4) Khor Swee Heng (5) Khor Swee Choon (deceased).

In order to comply with the requirement of the Kedah State Government for the purpose of securing a new licence for the extraction of timber the company decided to change its status from one of partnership to a private limited company. In pursuance of its objective, the plaintiff company was set up and duly registered in 1970. The partners become the directors of the newly formed company which carried on its usual business on the said land.

To further materialise its intention, an agreement was entered into between Padang Serai Kilang Papan Company as the vendor and Padang Serai Kilang Kayu Sdn. Bhd. (The plaintiff) as the purchaser on 5 October 1970.

Under the terms of the agreement the plaintiff company would have a paid up capital of $300,000 divided into $30,000 shares of $10 each. The plaintiff company would acquire and take over the business of Padang Serai Kilang Papan Company. And by virtue of cl. 1.1 of the agreement the plaintiff agreed to purchase all monies, bills, notes and other negotiable instruments and securities for money investments and the book and other debts of the said business and the full benefit of all contracts and agreements to which the vendors were entitled in relation to the said business.

Clause 2 of the said agreement provides for allotment of shares of the plaintiff company to the vendors and the shares shall be deemed to be fully paid up. Under the same clause Khor Swee Choon (deceased) was allotted the most number of shares ie, 3000.

In accordance with cl. 1.2, the plaintiff company would also purchase the stock in trade, plant and machinery, land, furniture and fixture, motor vehicles and effects of the said business.

The plaintiff also claimed that in consideration of the 3000 shares allotted to him the said Khor Swee Choon (deceased) had by a verbal agreement agreed to transfer the said land (where the factory and the company premises stood) to the plaintiff company.

It was further contended by the plaintiff that the word 'land' appearing in cl. 1.2 of the agreement refers to the said land. This contention was supported by the evidence of PW1 which stated that he was present at the time the agreement was signed. PW1 confirmed that at the time of the taking over of the partnership business by the plaintiff company Khor Swee Choon (deceased) was alloted 3000 shares in the plaintiff company and in consideration of that he (Khor Swee Choon) had agree to transfer the said land to the plaintiff company. Unfortunately he died just five days after the agreement was executed.

In resisting the plaintiff's claim the defendants raised the following defences in their statement of defence.

(1) Plaintiff's claim is statute barred by virtue of either s. 6 or s. 9 of the Limitation Act 1953.

(2) Defendants have been improperly joined as parties.

(3) Defendants are under no obligation to comply with plaintiff's request as plaintiff's action against the defendants is not maintainable

The Issue Of Limitation

It was contended on behalf of the defendants that the plaintiffs action is statute barred. Counsel for the defendants argued that from the statement of claim it would appear that the cause of action was founded on a contract. As such by virtue of s. 6(1) of the Limitation Act 1953, he said the cause of action could not be brought after the expiration of six years from the date on which it accrued. He further argued that cl. 6 of the said agreement provided that the sale should be completed on or before 30 November 1970. Therefore time would start to run against the plaintiff from that date or five months after the death of Khor Swee Choon (on 10 October 1970) when PW2 approached one of the beneficiaries and requested that the said land be transferred to the plaintiff. Since the writ was only issued on 14 April 1985 the plaintiff's action was clearly time barred.

It was further submitted on behalf of the defendants that although the deceased had died on 10 October 1970 and that there was an interval between his death and the extraction of letters of administration, that did not prevent time from running against the plaintiff.

In rebuttal, learned counsel for the plaintiff submitted that the plaintiff's claim was brought well within time and not time barred. He argued that time would start to run against the plaintiff only after the date the Letters of Administration was extracted ie, after 19 May 1982. And since the action was filed in 1985 it was well within time.

With the greatest of respect to both learned counsel I must say that their assumption of facts and law on this issue is wrong.

Adverting now to what had been pleaded by the plaintiff in their statement of claim coupled with the evidence adduced which was not disputed by the defendants, it would seem obvious that both counsels had overlooked the fact that the said land originally belonged to Khor Swee Choon (deceased). As a matter of fact he was the only partner who owned property (ie, the said land). The premises of Padang Serai Kilang Papan Company stood on this piece of land. Even after the taking over of the partnership by the plaintiff the business was pursued on the said land. Thus being the position the possession of the said land had always been with the plaintiff.

With these facts in mind, let us examine what the plaintiff is claiming for. Now, the plaintiff's claim is for a declaratory relief that the said land belongs to them and also to specific performance of the agreement dated 5 October 1970 and the verbal agreement between the parties. In my considered opinion the plaintiff's action therefore is an action to recover land.

An action to recover land is governed by s. 9(1) of the Limitation Act 1953 which provides:

> no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

In this connection, the decision of the Court of Appeal in *Ponnusamy & Anor v. Nathu Ram* [1959] MLJ 86 bears a lot of relevance. It was held by the Court of Appeal that whether the period of limitation was six years by reason of s. 6, or twelve years by reason of s. 9 depends on the nature of the plaintiff's claim. As the plaintiff's claim in that case was for a declaration that they were entitled to the land, therefore, the action was 'to recover land' within the meaning of s. 9 of the Limitation Ordinance (as it was then).

At p. 88 of the judgment Thomson CJ (as he then was) held:

> Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s. 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of action founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided". By s. 9, however it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be twelve years and it is clear that this applies to all action to recover land irrespective of whether they are founded on contract or otherwise.

The same view was adopted by the Federal Court in *Nasri v. Mesah* [1971] MLJ 32. Gill FJ (as he then was) in his judgment said:

> It follows, therefore, that whether the action is for specific performance of an agreement for sale of land or for declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be twelve years in either case. (See also *Ho Ah Kum v. Paya Trubong Estate Sdn. Bhd.* [1987] MLJ 143 and *Wong Sin Meng v. Wong Sam Moi* [1991] MLJ 27).

Based on the authorities indicated above, I hold that the period of limitation in relation to an action for recovery of land, as in this case, is 12 years.

Having said that, the next question for determination is 'when does time or period of limitation start to run? In answer to this, I would again refer to the case of *Nasri v. Mesah* where the Federal Court held:

> (2) time begins to run for the purpose of limitation from the date of any infringement, or threat of infringement of the appellants right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

In determining when the right to sue arises or accrues in an action founded in any other right, the Privy Council in *Mt Bolo v. Mt Koklan & Ors* [1930] AIR PC 270 held:

> There can be 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

Now, coming back to our case, it would appear that before the commencement of the action by the plaintiff, there was no infringement of the right of the plaintiff. The plaintiff had all along been in possession of the said land. The company's premises had always remained on the said land. As a matter of fact the company's operation is still being carried on presently on the said land. However when the defendants filed their defence to the plaintiff's action

on 14 April 91 that would constitute an unequivocal threat to infringe the right of the plaintiff (See *Wong Sin Meng v. Wong Sum Moi* [1991] MLJ 27).

The defendants in this case had also applied to strike out the plaintiff's claim on 8 September 1986 which action could also constitute an unequivocal threat to infringe the right of the plaintiff. Again in 1982 the plaintiff became aware that the said land had been distributed to the defendants and the transfer had also been registered. This clearly amounted to an infringement of the plaintiff's right. Whichever date is taken for the purpose of calculating the limitation period, it does not make the plaintiff's action time barred. As such the defence of limitation raised by the defendants must necessarily fail.

Misjoinder Of Parties

It was argued on behalf of the defendants that the plaintiff's action is not maintainable against them. It was contended that the plaintiff ought to have joined the Administrators of the Estate of Khor Swee Choon as defendants. It was further argued on behalf of the defendants that since the Letters of Administration was issued to Khor Khai Ngo and Khor Chiew Ngo, they both should have been made parties to the action. It was submitted by counsel for the defendants that since the plaintiff was aware that Letters of Administration had been granted to the estate they should have brought the action against the personal representative ie, the administrators and not against the defendants who are the beneficiaries of the estate. Learned counsel referred to O. 15 r. 6A of the Rules of the High Court 1980 in support of his submission.

My answer to learned counsel's submission is quite simple. There is no doubt that the plaintiff's action is founded on agreements entered by Khor Swee Choon (deceased) during his life time. The plaintiff here is not asking for the return of the 3000 shares allotted to the deceased nor for any monetary claims arising from the allocation of shares to the deceased. Their claim in only for a declaration and an order for specific performance of the agreements to clothe them with legal title in respect of the said land.

The land has now been transferred and registered in the defendants' names as beneficiaries of the deceased's estate. Upon the transfer of the said land and registration executed in favour of all the defendants, the title and interest of the deceased's estate in the said land has now been vested in the beneficiaries (ie, defendants). For the purpose of the relief sought by the plaintiff, the defendants are in my opinion, the proper parties to be sued. As for the administrators once the estate has been accordingly distributed to all the beneficiaries (and in this case the transfers had also been executed) they would have discharged their duties and would no longer be responsible for the estate. Rightly, they cannot be made parties to the action. Therefore, I hold

the view that the defendants were properly made parties to this action. (See *Hj. Othman bin Abu Bakar v. Saiyed Noor* [1952] MLJ 97).

I shall now turn to another aspect of the case. According to the evidence of PW1 and PW2 Khor Swee Choon (deceased) had agreed to transfer the said land to the plaintiff in return for the 3000 shares allotted to him. PW1, the sole surviving partner, who was present at the time the agreement was signed testified that the word 'land' as mentioned in the agreement referred to the disputed land on which the factory stood and at that particular period the said land was valued at RM30,000. He reiterated that the deceased had undertaken to transfer the said land to the plaintiff company. This verbal agreement made by the deceased was agreed upon by the other directors.

On behalf of the defendants it was argued that this evidence of the plaintiff with regard to the undertaking by the deceased to transfer the said land to the plaintiff is not admissible. According to counsel for the defendants the agreement had been reduced into writing but there was no mention about the description of the said land although the word 'land' appeared in cl. 1.2. There was also no mention in the agreement that Khor Swee Choon (deceased) had agreed to sell his land to the plaintiff. It was counsel's submission that it is a cardinal rule in the interpretation of documents that the intention of parties must be gathered from the written instrument itself and nowhere else. No evidence could be given to add, contradict or vary the contents of the agreement. Counsel relied on s. 92 of the Evidence Act 1950 which reads as follows:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to s. 91, no evidence of any oral agreement or statement shall be permitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

On the strength of this provision counsel said the plaintiff is precluded from adducing such evidence.

With respect to learned counsel for the defendants, I am of the opinion that s. 91 and 92 of the Evidence Act does not preclude the admission of oral evidence completely. The provisions under s. 92 reads as follows:

> (a) ...
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) ...

(d) ...

(e) ...

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

The Federal Court had occasion to consider the admissibility of oral representations under the provision of s. 92 in *Tan Chong & Sons Motor Company Sdn. Bhd. v. Alan MC Knight* [1983] 1 MLJ 132 where it was held:

> the prohibition against admissibility of evidence under s. 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing oral evidence can be given to prove the terms agreed to orally. (See also *Tan Siew Gaik v. Loke Poh Seong* [1978] 2 MLJ 171).

In *Keng Huat Film Co Sdn. Bhd. v. Makhanlall (Properties) Ptd. Ltd.* [1984] 1 MLJ 243, the Federal Court held that s. 91 not forbid the admission of other evidence where that evidence gives a factual background to the case. Mohamed Azmi FJ (as he then was) had this to say at p. 247:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful, and secondly to exclude evidence of the parties subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

Coming back to the present case, I would observe that the effect of the agreement dated 5 October 1970 should not be determined wholly within the four corners of the document. In my opinion, it must be viewed in the context of the surrounding circumstances of the transaction including the conduct of the parties at the time the agreement was entered into, the nature of the agreement (ie, its formality) and also its factual background.

Firstly, what is the nature of the transaction? To my mind, it was a simple taking over exercise from a partnership to a limited company. The parties to the agreement were none other than the former partners who were also the newly appointed directors of the company. It was just a matter of taking over the business whilst the operation remainded the same (ie, sawmill and timber related business). The factory premises remainded on the said land. The business was taken over log stock and barrel, so to speak. In my considered

opinion, in any exercise of this nature, the most logical and appropriate step for the new company to take was to acquire all the assets of the partnership including the land. And to my mind, this could be the most probable thing that could have happened in this case.

Secondly, what is the nature (ie, formality) of the agreement? It was prepared by the secretary, a layman without any legal professional background whatsoever. It was a layman's agreement based merely on understanding and undertaking between the parties who originally were partners and subsequently became directors of the new company. PW1, the sole surving partner, who was present at the time the agreement was signed gave evidence of such undertaking. I find him to be a witness of truth. Further, his evidence was corroborated by the evidence of PW2 who was one of the directors in 1970 and presently the Managing Director of the plaintiff company.

Thirdly, the fact that the plaintiff company still remained in possession of the said land is consistent with the arrangement arrived at between the parties ie, that the transfer of the land was in consideration of the 3000 shares allotted to the deceased. Thus it may legitimately be inferred that that was the arrangement intended by the partners as vendors and the plaintiff as purchasers. It would seem that there is a direct link between the retention of possession of the said land by the plaintiff (as purchaser) and the oral agreement made by Khor Swee Choon (deceased) as claimed by the plaintiff.

I would reiterate that where there is a prior oral agreement or statement verbally agreed to by the parties at the time of executing the document, pertaining to a matter on which the document is silent, evidence relating to its nature (formality), factual background, surrounding circumstances may be given when such agreement is not inconsistent with or does not contradict the terms of the document. Having said that, in my opinion the oral evidence adduced by the plaintiff is admissible under provisos (b) and (f) to s. 92 of the Evidence Act 1950.

The defendants on the other hand never denied the fact that amongst the partners (vendors) the deceased was the only one who owned land and it so happened that the land was the same land on which the factory stood. And since 'land' is mentioned in cl. 1.2 of the said agreement I hold the view that the plaintiff had by their pleadings and evidence given a consistent and reasonable explanation as to what had been agreed upon by the parties. In the absence of any evidence to the contrary, the plaintiff's explanation must be accepted.

Finally, I would humbly say that the defendants' defence consists of nothing more than a mere lack of knowledge with regard to the facts pleaded by the plaintiff in their statement of claim.

In the event I would grant the declaration prayed for by the plaintiff and order that the defendants execute the transfer of the said land in favour of the plaintiff and should the defendants refuse the Senior Assistant Registrar of the High Court is authorised to effect the transfer.

Plaintiff's claim is allowed with costs.